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No. 04-1611

In The
Supreme Court of the United States

NEBRASKA BEEF, LIMITED,

Petitioner,

v.

DENNIS GREENING, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL MEAT ASSOCIATION, AMERICAN MEAT INSTITUTE, AMERICAN ASSOCIATION OF MEAT PROCESSORS, SOUTHWESTERN MEAT ASSOCIATION, AND EASTERN MEAT PACKERS ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL MEAT ASSOCIATION, AMERICAN MEAT INSTITUTE, AMERICAN ASSOCIATION OF MEAT PROCESSORS, SOUTHWESTERN MEAT ASSOCIATION, AND EASTERN MEAT PACKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This *amici curiae* brief is submitted on behalf of the National Meat Association, American Meat Institute, American Association of Meat Processors, Southwestern Meat Association, and Eastern Meat Packers Association.[1] Petitioner Nebraska Beef Limited and Respondents Dennis Greening, et al. have consented to the filing of this brief. The correspondence regarding the *Amici's* requests for consent have been filed in the office of the Clerk.

I. INTEREST OF *AMICI CURIAE*

National Meat Association ("NMA") is a non-profit industry organization with its principal office in Oakland, California. NMA has served the interests of the meat industry since 1946. NMA is a well-recognized voice on important issues of meat policy, processing and safety in the U.S. All of its 250 general members are inspected by the Food Safety and Inspection Service ("FSIS"), the agency of the United States Department of Agriculture ("USDA") charged with administering the Federal Meat Inspection Act ("FMIA"). Petitioner is one of NMA's members and as a

[1] This brief was authored by outside counsel for the *Amici*. Counsel for a party did not author this brief. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief. *See* Sup. Ct. R. 37.6. Although Petitioner is a member of the National Meat Association, it has not made any financial contribution to this brief's preparation or submission.

result the *Amicus* is familiar with this case.[2] NMA is interested in ensuring that other members are not subject to retaliation for exercising their First Amendment rights.

American Meat Institute ("AMI") is a non-profit, national trade association, whose members are producers, packers, and processors of meat and poultry products marketed in the United States. AMI represents its members for purposes of furthering and protecting their interests, general welfare, and prosperity. AMI member companies account for more than 75 percent of the United States output of beef products.

American Association of Meat Processors ("AAMP") is America's largest meat trade organization. AAMP's members include more than 1,700 medium-sized and smaller meat, poultry and food businesses, including slaughterers, packers, processors, wholesalers, in-home food service businesses, retailers, deli and catering operators, and industry suppliers.

Southwestern Meat Association's ("SMA") members are meat processors, packers and purveyors, meat and meat product suppliers and service providers, livestock producers, financial institutions, and retail establishments. The primary focus of SMA's member companies is to produce products that meet or exceed consumer expectations

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[2] For example, the Executive Director of NMA accompanied the principals of Nebraska Beef to a meeting with senior officials of USDA in Washington, DC to discuss the retaliatory behavior of certain inspectors at the company's facility and was with the principals when they received a call right before the meeting from one of the inspector's supervisors. The supervisor called to inform the principals that their business was summarily closed in the middle of the morning shift, with many animals waiting to be processed.

with regard to product safety, nutrition and value. On behalf of its members, SMA initiates opportunities and resolves problems, thus helping to allow its member companies to earn a reasonable return on investment.

Eastern Meat Packers Association ("EMPA") is a non-profit organization that has represented the interests of its members since 1927. Its membership consists primarily of small to medium-sized meat and poultry processing firms located in the northeastern United States. EMPA represents its members on a wide variety of public policy issues at the state and federal level and conducts various educational programs. Virtually all of its processing members utilize beef as a major ingredient in their processing operations.

II. SUMMARY OF ARGUMENT

This *amici curiae* brief is submitted in support of petitioner's request for a writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit. The Petitioner raises two questions in its request. This brief addresses the second question presented – whether a *Bivens* cause of action is available to a meat company in the event employees of USDA retaliate against the company for exercise of its constitutional rights?

The meat industry is one of the most heavily regulated industries in the United States. Whenever meat slaughter or processing operations are conducted, a USDA in-plant inspector must be present. Depending on the operations, one or more inspectors are assigned to each establishment. For slaughter establishments, such as the Petitioner's, there are ten or more inspectors assigned. These assignments last for at least six months and often

longer. As a result, the same in-plant inspector(s) arrive when the establishment opens and leave when the shift/establishment ends for the day. These inspectors will inspect both the product and the operating facilities. If a food safety concern is raised, these inspectors have the power to stop operations, condemn products, and, in certain cases, suspend or close the business. Overall, during these lengthy tours of duty, the relationship between the regulator and the regulated are maintained on a professional basis, where both sides work to ensure the safety and wholesomeness of the products manufactured.

There are rare occasions where a personal animus develops between an inspector and an inspected company stemming from the company's appeal of one or more of the inspector's decisions or for some other exercise of the company's constitutional rights. Since the inspector will continue to be at the establishment on a daily basis, the inspector has the ability to retaliate by stopping production at critical times or taking regulatory action against product even if no food safety concern is present. Even if the actions are later reversed by the official's superiors, the damage has been done. With enough such disruptions, a company can simply be put out of business due to loss of customer goodwill and the costs of unwarranted business disruption. There is no adequate remedy for the loss of a business attributable to such conduct.

In egregious cases of official misconduct, lower courts have recognized an action against the officials for violation of constitutional rights under a *Bivens* theory.[3] The continued

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[3] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This case recognized a cause of action

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availability of this remedy is necessary to preserve the constitutional rights of meat establishments, when there has been retaliation, and to deter such conduct.

III. ARGUMENT

A. THE EIGHTH CIRCUIT'S DECISION CHILLS THE CONSTITUTIONAL RIGHTS OF FSIS-INSPECTED ESTABLISHMENTS

Under the FMIA, all meat products to be distributed in commerce must first be inspected by the federal government and marked as "Inspected and Passed."[4] This applies to carcasses and meat (21 U.S.C. § 604) and meat food products (21 U.S.C. § 606). This inspection and marking is performed by FSIS inspectors.[5]

The FMIA charges the in-plant inspector with determining whether the establishment is conducting its operations in a sanitary manner and that the products are not adulterated before he or she applies the mark of inspection. 21 U.S.C. §§ 604, 606 & 608. In the event the inspector finds the conditions of the establishment are not sanitary, the inspector can refuse to permit operations,

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against federal officials directly under the Constitution for violation of constitutional rights.

[4] This requirement applies to all products in interstate commerce, and, if the state does not have an inspection system equal to the federal system, all products in intrastate commerce must be inspected by federal officials. 21 U.S.C. §§ 610(c)(2) & 661.

[5] Section 21 of the FMIA, 21 U.S.C. § 621, authorizes the Secretary of Agriculture to appoint inspectors to conduct the mandatory inspections. The Secretary delegated his authority to the Under Secretary for Food Safety, 7 C.F.R. § 2.51, who, in turn, delegated to the Administrator of FSIS, 7 C.F.R. § 2.53.

and if the product is "adulterated," the product is rejected and must be condemned. These types of actions are referred to as "regulatory control action[s]." 9 C.F.R. § 500.1(a). In cases where the in-plant inspector takes a regulatory control action, the action and the basis for the action are documented on a non-compliance report ("NR"). Hence, in many cases, an NR is not a simple citation of a regulatory non-compliance, but a documentation of a regulatory control action which affected product, operations, or both.

In fulfilling his or her duties, the inspector has to make literally hundreds of judgments on a daily basis. These include application of the legal definition of adulteration;[6] determinations as to sanitation; and administration of and compliance with over 300 pages of regulations, not counting the dozens of "Directives," "Notices," "Question and Answer" documents, and other informal policies issued by FSIS to its inspectors. In short, inspection, of necessity, involves subjective judgments by the individual inspectors. With subjectivity comes the potential for disagreements as to the correctness of the inspector's decision.

The system generally works well. In the vast majority of cases, this is due to the professionalism of the inspector and establishment. In most other cases, the potential abuse of inspection authority is prevented and/or mitigated by USDA's management oversight. Yet, there are

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[6] The adulteration language of the FMIA, 21 U.S.C. § 601(m), was taken from Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 342. Although there have been few cases under the FMIA, there have been hundreds of cases interpreting the FDCA's "adulteration" language.

rare, but unfortunate situations where an inspector retaliates because an establishment has exercised its First Amendment right to appeal an inspector's decision or an inspector's personal conduct.[7]

Given the practical consideration of the perishability of the raw meat, when an inspector repeatedly stops production, appealing to the inspector's supervisors may result in the loss of the marketability of the product regardless of the supervisor's decision. There is a saying in the fresh meat industry: "sell it or smell it." This fact, coupled with concerns of retaliation from the inspector the next day, account for the relatively infrequent appeals of inspector decisions. Moreover, the supervisors, especially at the higher levels, are not at the plant, and may rarely or never have visited the plant. As a result, supervisors are inclined to rely on the inspector's description of the incident, rather than initiate any independent verification. In short, the perishability of the commodity combined with the company's mandated daily relationship with its inspector and the practical limitations of the appeals process can effectively chill the company's constitutional rights.

The fact that the system works as well at it does, enabling Americans to enjoy the safest and lowest cost meat in the world, is a testament to the professionalism of both meat companies and FSIS inspectors. However, the fact remains that a "rogue" inspector, with the authority to take regulatory control actions and with little immediate

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[7] Conduct issues which establishments have appealed include alleged sexual harassment of establishment employees. These appeals are usually not well-received by an inspector, and an establishment often makes these appeals at the risk of facing a strained inspection relationship with its in-plant inspector in the future.

supervision, can improperly close a business if he or she wishes to retaliate against an establishment.

B. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH *BIVENS* AND ITS PROGENY BY HOLDING THAT FSIS INSPECTORS CANNOT BE HELD LIABLE FOR VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE ESTABLISHMENTS THEY INSPECT

Prior to the Eighth Circuit's decision in *Nebraska Beef*, there was little doubt that a *Bivens* action may be brought against an FSIS inspector for intentional violation of an establishment's constitutional rights.

The first *Bivens* action brought against USDA involved a different regulatory scheme, but the potential damage to a company was the same – being put out of business. In *Butz v. Economou*, 438 U.S. 478 (1978), a formerly-registered futures commission merchant brought suit under the *Bivens* theory against the Secretary of Agriculture and various Department officials for allegedly violating his constitutional rights. In finding that the *Bivens* cause of action would apply to USDA officials exercising discretion, this Court noted:

> If . . . all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs.

438 U.S. at 505.